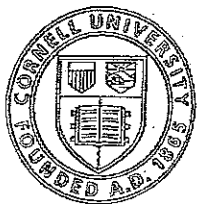

Project Labor Agreements in New York State: *In the Public Interest*

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Introduction

It is especially challenging in these tough economic times for officials within New York City's and New York State's many entities to decide how best to use public money for construction and renovation projects. This article is intended to serve as a resource to help officials make better informed decisions about the value of project labor agreements [PLAs]. It also encourages readers to see PLA use within broader objectives of sound public policy.

PLAs have been demonstrated to be a very useful construction management tool for cost savings, for on-time, on-budget, and quality construction. But PLAs are not necessarily appropriate for every project. This report reviews the background and legal standards for the appropriate use of PLAs on public works projects in New York City and State. It details what PLAs do, how they have been used, and the benefits they offer — benefits that extend to workforce and economic development.

This report also tests the validity of the claims made by PLA opponents that PLAs drive-up construction costs. Focus is on the studies conducted in recent years by the Beacon Hill Institute, a particularly outspoken opponent of PLA use in both the public and private sectors.

Public Sector Project Labor Agreements: An Overview

A Project Labor Agreement is a type of pre-hire agreement. Pre-hire bargaining means that construction unions and contractors have bargaining rights and can enter into agreements before any workers are hired and without a particular union having to demonstrate majority support among employees of an ascertained bargaining unit. Most pre-hire agreements cover work within a geographically defined jurisdiction for a particular craft and continue from project to project. A PLA, by contrast, is a project-specific, uniform agreement covering all the crafts on a project, and lasting only as long as the project. It is a comprehensive labor relations agreement—the “job site constitution”—that governs over various area craft agreements, setting uniform terms and conditions, for a particular project. Where the PLA is silent, the area agreements’ terms are not impacted.

Because they are negotiated pre-bid and specifically tailored to the needs of particular projects, PLAs give project owners, building contractors and trade unions a unique opportunity to anticipate and avoid potential problems that might otherwise arise and possibly impede project progress. They maximize project stability, efficiency and productivity and minimize the risks and inconvenience to the public that often accompany public works projects. This is why Project Labor Agreements have long been used in the private and federal sectors, and more recently by state, county and municipal agencies.

PLA use in the public sector is now a settled question in New York State and other jurisdictions around the country. In its landmark 1993 *Boston Harbor* decision, the U.S. Supreme Court recognized the value of PLAs in serving the public interest and opened the door for their use by state, county and municipal agencies. In its 1996 *Thruway Authority* decision, the New York Court of Appeals established guidelines for the use of Project Labor Agreements on publicly funded construction throughout the state. The following year, 1997, Governor Pataki issued an Executive Order reaffirming the utility of PLAs and encouraging their use in New York State. That Executive Order has been adopted by the succeeding Spitzer and Paterson administrations.

Project Labor Agreements make sense for public works projects because they promote a planned approach to labor relations, allow contractors to more accurately predict labor costs and schedule production timetables, reduce the risks of shoddy work and costly disruptions, and encourage greater efficiency and productivity.

On a typical construction project operating without the benefit of a PLA, there can be fifteen or more different collective bargaining agreements covering work being performed by various

crafts. As many as fifteen separate union contracts are not generally coordinated in any meaningful way and this leads to certain inefficiencies — inefficiencies that can be addressed by a PLA.

Project Labor Agreements are negotiated to cover all the crafts on a single project and the term of the PLA coincides with the duration of the project. A PLA standardizes otherwise incompatible work schedules, apprentice-journey level ratios, hours, payment arrangements, and other terms and conditions, providing greater cost efficiencies. Some PLAs also include cost saving procedures for workers compensation issues.

PLAs provide job stability and prevent costly delays by: 1) providing a uniform contract expiration date so that the project is not affected by the expiration of various local union agreements while the PLA is in effect; PLAs in New York City simply incorporate the new wage rates negotiated for those local union agreements; 2) guaranteeing no-strikes and no-lockouts; 3) providing alternative dispute resolution procedures for a range of issues; 4) assuring that contractors get immediate access to a pool of well-trained and highly-skilled workers through union referral procedures during the hiring phases and throughout the life of the project.

Whether a PLA is appropriate for a particular project is determined on a case-by-case basis following standards established in 1996 by the New York State Court of Appeals. The burden is on the New York public owner to demonstrate, typically through a consultant's feasibility or due diligence report, that a PLA has a proper business purpose, that it will provide direct and indirect economic benefits to the public and promote the particular project's timely completion. PLAs are more likely found appropriate — and experience has demonstrated great value — for larger, more complicated projects that last more than a few months and that often present unique scheduling issues.

If the consultant's feasibility study determines that a PLA is appropriate for a particular project, the public owner will then authorize that a PLA be negotiated typically between a construction manager, representing the public owner, and the leadership of an area or state building and construction trades council.

The agreement is then included within the bid specifications so that potential bidders can better project their costs and schedule timetables. Bidding on a PLA project cannot, under state competitive bidding laws, be restricted to union contractors; public sector PLAs are not — and cannot lawfully be — union-only agreements. Bidding is open to all contractors — union and non-union. All successful bidders must become signatory to the PLA but are not necessary bound thereby to other jurisdiction-based agreements.

Typical PLA provisions include the following:

- Collectively bargained wage rates and fringe benefit payments are incorporated into the PLA
- Negotiated changes in the journey level — apprentice ratios — requires a waiver
- No further negotiations on wages or benefits are conducted for the life of the agreement; the practice in New York City is that wage rates that are newly negotiated for area agreements during the term of the PLA will be adopted by the PLA
- Work schedules and other terms are made uniform among the various crafts
 - This amounts to a construction strategy enabling project planners to tailor production, account for logistical challenges, address a public owner's needs, and minimize the project's disruption and inconvenience to the public
- Hiring is conducted through union referral procedures; nonunion subcontractors are often permitted to retain a defined percentage ["core" group] of employees outside of referral procedures
- Exclusive representation is granted to the appropriate labor organization for employees in their craft
- A contractual commitment to uninterrupted production is made via a no-strike / no lockout, no slowdown or disruption clause
- Dispute resolution procedures are put into place to address contractual and jurisdiction issues: these may include a grievance-arbitration procedure, joint labor-management problem solving, and alternative dispute resolution [ADR] to resolve disputes involving the payment of workers' compensation benefits
- Fringe benefit payments are directed to joint-trustee pension, health insurance, vacation and apprentice training trust funds, etc.

Background

US Supreme Court *Boston Harbor* Decision Makes PLAs Available for State-Funded Projects [1993]

PLAs were used on federally funded projects for sixty years prior to the G. W. Bush administration and for private sector construction for nearly a century. PLAs have, for example, been used for major federal public works projects since the 1930's. Federal agencies are again encouraged to require the use of PLAs on large-scale projects per President Obama's Executive Order of February 6, 2009. Construction of the Grand Coulee Dam, Shasta Dam, Kennedy Space Center, nuclear missile sites, and the nuclear research facility at Oak Ridge, Tennessee all utilized PLAs. They have been used extensively in the private sector since the early decades of the century. During the 1980's and 1990's, for example, Disney, Toyota, General Motors, and major oil companies [Trans Alaska Pipeline] all used PLAs for major construction projects. In the 1993 U.S. Supreme Court *Boston Harbor* decision¹ PLAs were also permitted and used for state-funded projects.

This landmark case involved the PLA for the court-ordered clean up of Boston Harbor, a job originally estimated to last ten years and cost \$6.1 billion. At issue was whether a non-federal public entity, here the Massachusetts Water Resources Authority, could choose a contractor based on the contractor's willingness to enter into a project labor agreement and to make this agreement an enforceable part of the bid specifications. The Court unanimously held that it could do so. The public entity was acting as an owner/purchaser, not as a regulator of labor relations, and was, therefore, not preempted by federal law from enforcing the agreement.

The *Boston Harbor* decision significantly broadened the use of PLAs and is a strong statement by the Court supporting collective bargaining in the construction industry. The Court considered the intent of Congress in amending the National Labor Relations Act [NLRA] to allow construction industry pre-hire and restrictive subcontracting agreements [Section 8(e) and 8(f)]. It then declared that the same rationale which justifies the use of such agreements in the private sector also justifies their use in the public sector when public agencies are acting as property owners:

It is evident from the face of this statute [National Labor Relations Act, as amended] that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry. Such

¹ *Building and Construction Trades Council of the Metropolitan District, et al. v. Associated Builders and Contractors of Massachusetts / Rhode Island, et al.*, 507 U.S. 218 at _____, 142 LRRM 2649, 2651, (1993), hereinafter "Boston Harbor."

conditions include; among others, the short term nature of employment which makes post-hire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long standing custom of pre-hire bargaining in the industry.

There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that the private purchaser may choose a contractor based upon that contractor's willingness to enter into a pre-hire agreement, a public entity as purchaser should be permitted to do the same...In the absence of any expressed or implied indication by Congress that a state may not manage its own property when it pursues its purely proprietary interest, and where analogous private conduct would be permitted, this Court will not infer such a restriction...²

The Court discusses the historic use and benefits of PLAs — for stability and productivity — and explains why those benefits should be extended to states and municipalities; the rationale for using PLAs in the private sector also justifies their use in the public sector when public agencies are acting as participants in the construction marketplace. Let all parties operate freely within that marketplace and have the flexibility to authorize or enter into agreements that advance their interests. Important public interests are served when public entities make effective use of limited public resources by securing optimum productivity and insuring the timely and successful completion of the project.³

While *Boston Harbor* provided state agencies with a constitutional privilege to require project labor agreements as part of bid specifications, it did not address the limitations on state agencies' authority to use PLAs under state competitive bidding laws. Post-*Boston Harbor* litigation in state courts throughout the nation has now largely resolved these issues by upholding the use of PLAs in the vast majority of cases.⁴ But standards for when and how state agencies can authorize PLAs vary according to respective state court decisions.

² *Boston Harbor* at 2654-5.

³ *Boston Harbor* at 2654.

⁴ "PLA Scorecard: Unions 30, Open Shop 6: Labor Wins Bulk of Legal Challenges Against Project Labor Agreements," *Cockshaw's Construction Labor News and Opinion*, Vol. 29, No. 12, December 1999; "Labor Savors More PLA Successes," *Cockshaw's*, Vol. 29, No. 11, November 1999; "Unions Enjoy More PLA Successes," *Cockshaw's*, Vol. 30, No. 5, May 2000. This trend toward upholding PLA use has accelerated in recent years so that PLA use at the state level is now well-established.

When Is It Appropriate to Authorize a Project Labor Agreement?

New York State Court of Appeals *Thruway Authority* Decision
Establishes Standards for Public Sector PLAs in New York [1996]

New York standards were established in the 1996 Court of Appeals decision in the combined case involving PLAs authorized by the New York State Thruway Authority [NYSTA] and the Dormitory Authority of the State of New York [DASNY]. The Court of Appeals upheld the PLA for the \$130 million, four-year *Thruway Authority* (Tappan Zee Bridge) project but rejected it for the \$170 million, five-year Dormitory Authority (Roswell Park Cancer Institute) project.

A critical distinguishing factor was that the NYSTA based its authorization of a PLA on the recommendation of its project manager, Hill International, Inc., pursuant to a pre-bid cost analysis which favored a uniform agreement; by contrast the DASNY decision was made *after* bids were opened, even after some of the renovation work had begun, and was not supported by a detailed review and analysis similar to that used by the NYSTA.

The court held that the validity of PLAs would be considered on a case-by-case basis per the following criteria:

- Project labor agreements are “neither absolutely prohibited nor absolutely permitted” on public construction projects in New York
- A PLA could be sustained for a particular project where the record supporting the determination to enter into the PLA was justified by the interests underlying the competitive bidding laws
- The public authority must show more than a rational basis for its determination that its use of a project labor agreement had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes. The decision to adopt a PLA for a specific project must be supported by the record; the authority bears the burden of showing that the decision had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes
- Two central purposes of New York’s competitive bidding statutes, as restated within the *Thruway* decision, are protection of the public fisc by obtaining the best possible work at the lowest possible price, and prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts⁵

⁵ *New York State Chapter, Associated General Contractors v. New York Thruway Authority*, 88 N.Y.2d 56, 666 N.E.2d 185, 643 N.Y.S. 2d 480, 151 L.R.R.M. (BNA) 2891, 42 CLR 117, 133, 4/13/96; hereinafter “*Thruway*”

An agency decision based on a consultant/construction manager's report is the key element for having that decision upheld by New York courts. The report should show, regardless of the size or complexity of the project, that a PLA is justified based on specified cost savings—both the direct and indirect benefits of a uniform agreement—taking into account such unique factors as the project's timetable and a history of labor unrest.

Governor Pataki's Executive Order endorses the use of PLAs [1997]

Governor George Pataki issued Executive Order No. 49 on January 30, 1997—continued by Governors Spitzer⁶ and Paterson⁷—endorsing the use of Project Labor Agreements on appropriate public works construction projects. Each state agency is ordered to establish procedures “to consider, in its proprietary capacity,” the use of PLAs on publicly funded projects. The Order restates the broad policy goals for state-funded construction by declaring that

it is in the best interests of the People of the State of New York to promote the timely completion of public construction projects... while at the same time limiting the cost of such projects to the greatest extent possible consistent with the law and principles of fairness and equity.

The Governor's Order then recognizes the value of PLAs by stating that,

...it is now clear that project labor agreements are one of many tools which may be used by management and labor and which may, under certain circumstances, assist in achieving the goals described above;

The Executive Order directs state agencies to consider using PLAs “...where the standards established by the Court of Appeals can reasonably be expected to be met.” Agencies are advised to “show a proper business purpose for entering into such agreement” in order for their decisions to withstand judicial scrutiny.

Appropriate use and the application of *Thruway* standards

While the burden in New York State rests with the authorizing agency, courts in New York State have consistently upheld the use of PLAs for a variety of public works projects so long as the process and decision to authorize the PLA were consistent with the Court of Appeals *Thruway* standards. The following illustrate how, in the years immediately after *Thruway*, those standards were applied:

⁶ Executive Order No. 5, *Review Continuation and Expiration of Prior Executive Orders*, 1/1/2007.

⁷ Executive Order No. 9, *Review, Continuation and Expiration of Prior Executive Orders*, 6/18/2008.

- The Second Department, Appellate Division upheld the use of a PLA as appropriate for the construction and renovation of court and government facilities in Orange County, project involving \$29 million in state funding. Applying the *Thruway* standards, the key factor was job stability. The PLA's no-strike provision would "negate the possibility of strike induced delays" and "avoid costs occasioned by the payment of fixed fees of \$41,000 per month" that the county owed to the construction manager and architect. An additional cost savings factor related to negotiated changes in work rules. The court noted that the PLA permitted "the designation of working forepersons and... (excluded) traditional morning and afternoon 'breaks' from the project workday, resulting in a savings of as much as \$2,111,250 over the life of the project." Albany Specialties Inc., v. County of Orange (1997)⁸
- The Fourth Department, Appellate Division, Fourth Department in 1997 struck down a PLA for a City of Oswego sewer project because the City didn't adequately show the need for a PLA by presenting "a detailed projection of cost savings" from a PLA; the City did not identify "a unique feature" that the PLA would address nor "demonstrate a history of labor unrest that threatens the success of the project." The court added that, "A PLA may not be justified simply by the desire of a municipality 'for labor stability so that the work will be completed on time.'" Empire State Chapter of Associated Builders and Contractors v. City of Oswego (1997)⁹
- Three years later, in 2000, the Fourth Department upheld the PLA authorization by the Buffalo Board of Education. It distinguished these facts from those of the City of Oswego case. The Board's decision here was based on a detailed projection of cost savings provided by consultant engineering and architectural firm's report. The court also noted that the earlier Phase One of the project involved labor unrest that would be prevented by a PLA for Phase Two. Empire State Chapter of Associated Builders and Contractors, Inc., et al v. Board of Education of the City of Buffalo (2000)¹⁰

A more recent [2008] decision from Broome County shows just how closely courts may apply *Thruway* standards. Here the court invalidated the County's authorization of a PLA for

⁸ 240 A.D. 2d 739, 155 L.R.R.M. (BNA) 2856, 662 N.Y.S. 2d 773 (2d Dep't 1997)

⁹ 239 A.D.2d 875; 659 N.Y.S.2d 672; 1997 N.Y. App. Div. LEXIS 6233; 158 L.R.R.M. 2319 (4th Dep't 1997)

¹⁰ 269 A.D.2d 801, 703 NYS2d 418 (N.Y. App. Div., February 16, 2000)

\$10.4 million building reconstruction project because the consultant's feasibility study did not meet the test of "more than a rational basis." The study was rushed and lacked sufficient depth; it failed to show verifiable cost savings, "any type of unique complexity," or that a PLA was necessary to preserve labor harmony such as to justify the County's decision. Matter of Nelcorp Elec. Const. Corp. v. County of Broomé (2008)¹¹

Suggested Guidelines for Authorization

How might agencies reasonably assess the appropriateness of a PLA authorization in light of New York's relatively stringent case law? The following guidelines provide an overview or checklist for agency and board decision-makers consideration:

- Base the decision to ratify or authorize the Project Labor Agreement on a review of the project manager/consultant's report and recommendation.
- The project manager/consultant's report should analyze the particular cost savings and other benefits which a project labor agreement would provide.
- Among factors to be considered are the following:
 - Labor cost savings due to coordinating various craft schedules and other terms / conditions via a uniform agreement instead of various local union agreements
 - Potential cost savings and flexibility due to alternative dispute resolution procedures in response to job site problems, jurisdictional disputes and workers compensation claims
 - Potential benefits [time and money saved, public convenience] of ensuring labor harmony for the duration of the project; consider other projects where labor disputes increased costs
 - Whether a PLA would provide a more immediate and efficient access to a pool of skilled journey level workers and apprentices

¹¹ 2008 NY slip Op 50436U; 18 Misc. 3d 1144A; 859 N.Y.S.2d 896; 2008 N.Y. Misc. LEXIS 958 (2008)

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- ✦ Consider local labor market conditions:
 - › Is there a documented skilled labor shortage in the area or is there likely to be during the length of the project?
 - › Will other projects be competing for the same labor pool?
 - › Would a PLA provide an opportunity for apprentice recruitment and training?
 - The likelihood that the skill level will translate into safer job performance with reduction in costs due to lower injury rates
 - Whether or how a PLA would contribute to an on-time and on-budget completion of the project
 - ✦ Is the project of such complexity that a delay in one area will significantly delay the entire project?
 - › Does this project have serious time constraints?
 - › Would delay seriously inconvenience the entity, its clients, or the general public?
 - ▮ Examples are delaying the opening of school, causing transportation delays or congestion and interfering with revenue flow — collection of bridge tolls
 - The agreement should ensure that hiring is done in a nondiscriminatory manner, that contractors may be permitted to retain a certain percentage of “core” employees, and that all successful bidders must become signatory to the PLA.
 - Direct that a PLA be concluded prior to the opening of bids and include the complete agreement in the bid package.
 - Conduct bidding pursuant to a PLA in a nondiscriminatory manner, open to union and nonunion contractors.

How Do PLAs Affect Competitive Bidding and Project Costs?

Public-sector PLAs have consistently been upheld as consistent with state competitive bidding laws in New York State and other jurisdictions since the US Supreme Court empowered states to authorize PLAs in the 1993 *Boston Harbor* decision.

Critics of PLAs nevertheless continue to oppose PLAs, through largely unsuccessful litigation and lobbying efforts, claiming that PLA are inherently “anti-competitive,” “union-only” agreements that discriminate against non-union contractors, limit the pool of bidders and drive up construction costs. These claims are considered here in response to these three questions:

- 1) Do PLAs discriminate against non-union contractors and workers?
- 2) Do PLAs limit the pool of bidders?
- 3) Do PLAs raise construction costs?

Do PLAs discriminate against non-union contractors and workers?

Public-sector PLAs, when appropriately authorized, are consistent with the underlying purpose of New York State’s competitive bidding laws: to protect public funds by obtaining the best possible work at the lowest possible price, and to prevent favoritism, improvidence, fraud and corruption in the awarding of public contracts.

Under state competitive bidding laws, all bidding must be open and nondiscriminatory. Although union-only agreements are permitted in the private sector, bid awards in the public sector cannot be made on the basis of union status. Because union and non-union contractors are free to bid on projects covered by PLAs, they avoid the favoritism that competitive bidding laws are designed to prevent. Awards are frequently made to both union and non-union companies. Those same contractors are not required to become union contractors, that is, signatories to the respective area craft agreement, but only to become signatories to the PLA.

There is a second layer of protection against favoritism in the job referral procedure: unions cannot lawfully favor their members or discriminate against equally qualified non-members.¹² This is typically restated within the PLA itself. A useful example is the language within *Article 4—Union Recognition and Employment* of the PLA for the New York City School Construction

¹² NLRA; 29 U.S.C. § 158(b) (1) (A), (2)

Authority Five-Year Capital Programs [SCA] [discussed *infra*]. Section 3, Non-Discrimination in Referrals, includes the statement that

No employment applicant shall be discriminated against by any referral system or hiring hall because of the applicant's union membership, or lack thereof.¹³

PLA signatories, both union and non-union, as illustrated within the SCA PLA, can determine the competency of all referrals, determine the number of employees required, and have the sole right to reject any applicant referred by a local union. Where the union cannot provide qualified workers through referral, contractors can, following a defined time period—48 hours in the SCA agreement, secure workers from a source other than union referral. And non-union contractors are typically also permitted to “drag along” or bypass union referral for an agreed upon percentage, such as 12%, of its “core employees.”¹⁴

Non-union contractors who are signatories to the PLA may be persuaded to sign area agreements once they experience the advantage of systematic and ready access to properly trained, highly skilled workers. Union-trained journey-level workers must meet certain clearly defined standards for competence and contractors with access to this labor pool can then compete for—and more likely successfully perform—jobs requiring a higher degree of worker skill and technical experience. There is a competitive disadvantage for contractors within the nonunion or “open shop” sector to invest in worker training. One issue relates to the fierce pressure to contain labor costs, including training costs, and so undercut the competition. Another issue is that the non-union worker whose skills are upgraded may be tempted by better employment terms at another “open shop” company so that, in effect, the first contractor incurs a cost that benefits its competitor. The union sector, by contrast, provides a “level playing field” for training because union signatories pool their training resources—providing outcomes that are good for the industry and the overall economy.

Organizations representing non-union contractors have challenged the fairness and legality of PLAs for many years. But in endorsing PLA use, the courts have responded by essentially saying: You’re free to participate—or not to participate—in the PLA bidding process. If you play the game, you have to play by its rules. Otherwise seek your business opportunities elsewhere.

The Associated Builders and Contractors, Inc. (ABC), which represents non-union contractors,

¹³ *Project Labor Agreement Covering Specified Construction Work Under the Capital Improvement and Restructuring Programs (2005-2009)*, New York City School Construction Authority and Building and Construction Trades Council of Greater New York and Vicinity, at 12.

¹⁴ *Ibid.*, at 10-11.

has long opposed Project Labor Agreements. Directly addressing the ABC, a litigant in the *Boston Harbor* case, the U.S. Supreme Court made clear that

...those contractors who do not normally enter into such agreements [PLAs] are faced with a choice. They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement.¹⁵

The New York Court of Appeals later echoed the U.S. Supreme Court. Answering charges that PLAs are “anti-competitive”—meaning that they unfairly favor the union sector and cut into the business of open shop contractors—the Court of Appeals stated:

The fact that certain non-union contractors may be disinclined to submit bids does not amount to the preclusion of competition...¹⁶

There is a unifying theme that underlies public policy in this area—a basis for the rationales in *Boston Harbor* and *Thruway* decisions as well as statutes governing competitive bidding and contractor responsibility: government has a duty to protect the public interest and the right to influence the marketplace by the choices it makes as a marketplace participant.

Government agencies make choices and so do contractors. Contractors can choose to accept or reject government’s marketplace rules by bidding or not bidding on a particular project.

Do PLAs limit the pool of bidders?

PLA opponents argue that PLAs limit the pool of bidders and that this drives up costs. There is no evidence to support these assertions. While there are many reasons why contractors—both union and non-union—may choose not to bid on particular projects, there are no studies demonstrating that a PLA in the bid specifications is itself responsible for a decrease in the number of bidders; there is also no analysis showing that fewer bidders translates into higher actual project costs.

Two factors do influence bidding behavior and the number of bidders for particular projects—whether or not a PLA is at issue: bidding procedures and market conditions.¹⁷

¹⁵ *Boston Harbor* at 229

¹⁶ *Thruway* at 71

¹⁷ *Project Labor Agreements*, Dale Belman, Ph.D., Matthew M. Bodah, Ph.D., Peter Phillips, Ph.D., ELECTRI International, (2007), at 1, 13-14, 35-36; available at: <http://massbuildinggrades.org/project-labor-agreements-white-papers>. The authors reviewed previous research and conducted a study of bidding on both PLA and non-PLA projects in two adjacent school districts of the San Jose-Sunnyvale-Santa Clara, California construction market. They noted that different bidding methods can influence the number of bidders; in their comparison, one of

Bidding procedures that require separate prime contracts lead to more bidding activity because—in a given area—specialty contractors outnumber general contractors. It's worth noting that there will likely be a decrease in the number of bidders for New York State-based PLAs due to the recent exemption of PLA bidding from the NYS Wicks Law;¹⁸ this provision will save—not increase—costs for public owners who authorize PLAs.

The Wicks Reform of 2008 applies to contracts advertised or solicited for bid on or after 7/1/08 and expressly waives Wicks Law requirements (of separate specifications and bidding for plumbing, heating and electrical work) for bidding on projects where a PLA has been appropriately authorized by the public entity. While encouraging PLA use, the new law exempts more than 70 percent of public works projects from Wicks rules by raising project thresholds from \$50,000 to \$3 million—a 60-fold jump for New York City, to \$1.5 million for downstate suburbs, and to \$500,000 for upstate projects. These changes were intended as cost-saving measures: the New York State Division of Budget predicted that the legislation will save New York City \$200 million in long term capital construction costs for fiscal year 2009 along with annual debt service savings of \$14 million by CFY 2012. The reforms also represent a further policy endorsement of PLA use.¹⁹

Market conditions and the business cycle always impact bidding behavior. As the volume of work increases in a construction market, one can expect a decline in the number of bidders per project and an increase when less work is available.

There is a reason why some non-union contractors will choose not to bid on PLAs, a reason that gets to the core of the issue and that PLA opponents might prefer not to publicize: they do not want to operate within or adjacent to the unionized sector—what the *Boston Harbor*

the districts favors separate prime contracts on specialty work. Since there are more specialty than general contractors in most construction markets, that fact alone may account for more bidding.

Their report concluded that

...the only statistically significant variable that predicts bidding behavior is business cycle. In the period that construction activity increased, the number of bidder per bid opening decreased.

Most notably, the results of the study indicate that the presence of a PLA has no statistically significant effect on the number of bidders per bid opening.

PLA opponents argue that PLAs restrict bidders thereby reducing competition and raising prices. "The problem with this argument," according to the Belman team, "is that one need only about half a dozen bidders to get the full effect of bidding competition on prices. Furthermore, research to date only looks at whether nonunion contractors are discouraged and not whether union or high wage nonunion contractors are attracted by PLAs. In short, we do not know whether or to what extent PLAs discourage bidding."

¹⁸ NY CLS Labor Section 222 (2)(b) (2008)

¹⁹ See "Governor Paterson Announces Wicks Law Overhaul: Long-Sought Reform will Help Relieve Onerous Local Property Taxes," NYS Division of Budget, April 9, 2008 news release available at www.budget.state.ny.us.

Court meant by contractors choosing not to “alter their usual mode of business.” Non-union contractors may see PLA work as a threat to their workforce control so they choose to avoid having their employees work side-by-side with unionized craft workers and under prevailing wage and collectively bargained terms and conditions.

PLAs require that all successful bidders — union and non-union — become PLA signatories. This practice of restrictive subcontracting does not make PLAs unfair to non-contractors but, rather, meets an important public interest. Restrictive subcontracting is sanctioned by the National Labor Relations Act, along with pre-hire bargaining, to accommodate the particular conditions of the construction industry and, in particular, to provide contractors with a ready access to skilled labor, help contractors predict costs, and promote labor harmony and productivity on construction job sites.

It is important here to distinguish private from public-sector PLAs. In the private sector, PLAs can be union-only agreements — subcontracting is limited to those employers who are signatories to the appropriate craft agreement or agreements. Public-sector PLAs must comply with competitive bidding statutes and cannot lawfully exclude non-union contractors from bidding. Restrictive subcontracting in the context of public-sector PLAs means that all successful bidders, union and non-union, are required, as a condition of receiving the award, to be signatory to the PLA; they need not be signatory to a union area or craft agreement.

Restrictive subcontracting and pre-hire negotiations are essential practices of construction industry collective bargaining. Congress, the U.S. Supreme Court, and the National Labor Relations Board have all recognized that these practices are in the public interest because they provide stable relationships not only between employers and employees but between owners and general contractors as well as between general contractors and various subcontractors. All of these relationships create, as noted several years ago by the U.S. Supreme Court, a close community of interest on construction job sites.²⁰

The presence of multiple employers and employees of various crafts on a single construction job site also creates a high potential for friction between employers, employers and employees, and among employees. Conflicts can come from many sources including craft jurisdiction, the application of separate collective bargaining agreements with various, different expiration dates, or the close proximity of both union and nonunion employers and employees.

²⁰ *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982)

These can readily translate into picketing, for example, which targets a single employer but is likely to disrupt and delay the entire project.

To stabilize the various relationships and to mitigate the risks of disruption, the construction industry long ago developed restrictive subcontracting practices. While such practices are generally illegal, falling under the “hot cargo” prohibition of the National Labor Relations Act, Congress understood the need to preserve the status quo in bargaining relationships within the construction industry and in 1959 provided an industry-specific legislative exemption. It amended the Act [Section 8(e)] to permit agreements between prime contractors and unions to restrict or exclude certain subcontractors from a construction site.²¹ Congress recognized that the subcontracting dynamics of the construction industry made such an exemption necessary to promote productivity and preserve job site harmony.

A second legislative exemption [NLRA Section 8(f)] permits pre-hire agreements.²² In industries other than construction, an employer may not sign an agreement with a union unless there is proof that the union represents a majority of the employees. Construction industry employers may negotiate contracts not only before the union demonstrates majority status but before the employer hires the employees for the project.

The unique characteristics of the construction industry again provide the rationale. Pre-hire bargaining ensures the employer of immediate access to a pool of skilled labor during the hiring phases and throughout the life of the project and this also enables the employer to more accurately predict costs and timetables.

Due to the temporary nature of construction jobs and the mobility of its workforce, it is impractical, if not impossible, to show majority status through an NLRB supervised election—the particular job is likely to end and the workforce will move to the next job either before an election is held or before negotiations are completed. Reviewing the legislative intent behind these provisions, the U.S. Supreme Court not only noted the factors mentioned above but deferred as well to a “long standing custom” of pre-hire bargaining in construction, a custom which predates the 1935 National Labor Relations Act.

²¹ National Labor Relations Act, 29 U.S.C. 158(e)

²² National Labor Relations Act, 29 U.S.C. 158(f)

Do PLAs raise construction costs?

A PLA is an instrument to predict and control labor costs. PLA labor cost savings are both direct and indirect and can be substantial over the life of a project. New York courts require that an agency show a “proper business purpose” with a cost savings analysis. A decision to authorize PLA use without a study that articulates cost containment is not likely to withstand court scrutiny.

Direct costs savings are typically garnered from these provisions:

- Alternative dispute resolution procedures for — and containment of — workers compensation costs
- Elimination or reduction of premium rates including increased contractor flexibility for scheduling
- Reduction and standardization of the number of paid holidays
- Increased utilization of apprentices

Indirect labor cost savings, although not as easily quantified, are no less significant for the project’s overall success: to mitigate inconvenience for the user and its clients, for stable and productive operations and to avoid costly delays. These indirect cost savings are achieved through a combination of factors including:

- A uniform contract expiration date for all crafts
- No strike provisions
- Expedited dispute resolution procedures and joint committee structures to address a broad range of jobsite issues including jurisdiction
- Contractors having immediate access to a pool of skilled labor during the hiring phase and throughout the life of the project

Consultants’ feasibility or due diligence studies make reasonable forecasts of project labor cost savings by comparing and contrasting the terms and conditions of a proposed uniform agreement [PLA] with specific provisions with various area craft agreements; the consultant examines opportunities for cost savings while accounting for the project’s particular demands, such as highway, bridge, or school work that must primarily be done at certain hours.

A useful example of PLA cost containment is the report written in 1999 by consultant Hill International, Inc. for the I-287/Westchester Expressway construction project north of New York

City. This project was conducted in seven separate phases over six years at an estimated cost of \$265 million. Hill projected \$8.4 million in PLA-related cost savings based on the following:

• Standardizing work week/elimination of premium rates	\$ 563,260
• Standardizing work day with flexibility in starting/quitting times	864,538
• Adjustments for night shift work	969,448
• Standardizing eight holidays	3,272,888
• Increasing ratio of apprentices	1,032,878
• Using Alternative Dispute Resolution [ADR]: Workers Comp	485,526
• Managed Care program: Workers Compensation	1,280,981 ²³

Hill also conducted a feasibility study in 2004 for the New York City Department of Education 2005-2009 \$13.1 billion School Construction Authority *Five Year Capital Program*. The study concluded that a PLA was appropriate and identified several concrete ways that a PLA would save both direct and indirect labor costs.

The nature of the SCA project—rehabilitation and reconstruction of occupied schools—dictated that the majority of the work would be done during second shift. Hill saw the need to standardize schedules and rates. It recommended that contractors be provided with three [3] hours flexibility in starting times and five [5] hours in quitting times without premium penalty. The work week, at thirty-five [35] hours for a number of trades, was standardized to forty [40] hours. Based on a five percent [5%] shift differential negotiated in the PLA, along with the new, uniform forty hour work week, Hill estimated labor cost savings of over \$474 million during the five [5] year project or an 18.7% reduction in labor costs compared to construction without a PLA.

Hill recognized another cost savings opportunity by standardizing the number of holidays to six [6], reduced from a range of seven [7] to eleven [11] found in the various craft agreements. This produced an estimated savings of over \$14 million.

Hill measured the SCA feasibility study's forecasts against actual costs in a "PLA Post Audit" conducted during the fourth year of the project in 2008. Hill looked at five areas of work: exterior modification; windows; ADA compliance; laboratory upgrades; and electrical. It selected a representative sample of fifteen schools. Relevant cost data was gathered from

²³ *Feasibility for a Project Labor Agreement on the I-287/Cross Westchester Expressway Project*, prepared for NYS Department of Transportation, by Hill International, Inc., 1999, at 30-34.

such documents as contractors' bid breakdowns, engineers' estimates, payment invoices, and schedules of values. Labor costs were isolated from other construction costs and segregated by craft in order to assess the impact of the PLA. Labor cost data for each craft under the PLA was then compared with each craft's area collective bargaining agreement—the difference in labor costs if the PLA were not in place. Cost savings were calculated both in dollars and as a percentage of total construction costs and labor costs. Sample totals were extrapolated through the end of the five year project. PLA labor cost savings for the project's duration, although less than the original feasibility study projections, were quite significant at \$221,427,522. The difference between the 2004 and 2008 estimates of cost savings relates to changes in the way that the SCA had work performed and are not related to the PLA itself. By using a PLA, New York City taxpayers saved over \$44 million for each year of the project.

The \$221 million represents quantifiable direct labor cost savings. But this is only a part of a larger picture. There are direct labor cost savings from the use of Alternative Dispute Resolution [ADR] procedures and negotiated changes in the apprentice-journeyman ratios that are difficult to quantify. And there are indirect cost savings flowing from the PLA's guarantee of project stability and uninterrupted production that are substantial and no less important. These areas highlight a PLA's value not only for taxpayer and contractor savings but as a way to do the job on-time, on-budget and with proper oversight of worker safety and health.

PLAs provide a framework for a particularly high level of labor-management cooperation. This is reflected in provisions for joint committees as well as for alternative and expedited claims and dispute resolution.

Given the particular pressure to contain rising workers' compensation costs—and the burden that these costs represent for the construction industry—ADR procedures are one of the most important advantages of PLAs. ADR procedures are permitted in New York State when established through collective bargaining. The alternative procedures negotiated within PLAs, and subject to Workers' Compensation Board approval, replace WCB procedures with an expedited and non-adversarial process that can potentially save considerable time and substantial costs.

The SCA PLA illustrates typical resolution procedures. No strike and no lockout guarantees are backed by expedited arbitration procedures. Grievance and arbitration procedures are available for any disputes arising out of the contract. Jurisdictional disputes are handled by the *New York Plan for the Settlement of Jurisdictional Disputes [Article 10]* and supported by a separate contract section assuring continued production pending settlement. A broad

management's rights clause provides contractors with additional flexibility for scheduling and work assignments not inconsistent with other contractual provisions.

Joint committees are particularly important for effective communications, guidance and oversight during longer duration projects. The SCA PLA, for example, establishes a Program Labor Management Committee that meets on a regular basis with a broad charge to:

1) promote harmonious relations among Contractors and Unions; 2) enhance safety awareness, cost effectiveness and productivity of construction operations; 3) protect the public interest; 4) discuss matters relating to staffing and scheduling with safety and productivity as considerations; and 5) review Affirmative Action and equal employment opportunity pertaining to Program Work. [Article 8. Section 1.]

Such a useful provision clearly enables labor and management to make adjustments as become necessary during the project. In the wake of recent industry accidents in New York City and elsewhere, having a contractual forum for monitoring safety assumes a particular urgency and importance. The provision should also be seen in the larger context of the commitment to industry safety by New York City-based contractors and unions — now formally articulated in guidelines developed by the *Build Safe NYC Project*, an initiative of the Building Trades Employers Association and the Building and Construction Trades Council of Greater New York.

Despite this and other convincing evidence of PLA's value, and despite the requirement that public projects be governed by prevailing wages, PLA opponents continue to assert that PLAs raise construction costs so to discourage public entities from authorizing PLAs.

One particularly vocal critic of PLAs is the Beacon Hill Institute at Suffolk University [Massachusetts] [hereinafter "*Beacon Hill*"], a "free-market"-oriented think-tank founded in 1991 by Massachusetts millionaire and politician Ray Shamie.²⁴ Beacon Hill published a study in 2006, *Project Labor Agreements and Public Construction Cost in New York State*, which analyzed 117 public school construction projects conducted in New York State since 1996. Of the 117 projects, 19 were conducted using PLAs. This report concluded that "a PLA increases a project's base construction bids by \$27 per square foot (in 2004 prices) relative to non-PLA projects," what Beacon Hill called the "PLA Effect" or a 20% increase over base construction bids. Beacon Hill claimed that "the potential savings from not entering into a PLA on a school construction project range from \$2.7 million for a 100,000-square-foot structure to \$8.1 million for a 300,000-square-foot structure."²⁵

²⁴ www.beaconhill.org

²⁵ *Project Labor Agreements and Public Construction Cost in New York State*, Paul Bachman, MSIE and David Tuerck, PhD, Beacon Hill Institute at Suffolk University, Boston, Massachusetts (2006), at 1, 10, 12. ["Beacon Hill"]

Beacon Hill's conclusions should be dismissed as not credible for these reasons: 1) the study focuses on bid costs not actual costs; and 2) it fails to segregate labor costs or account for various factors that influence project costs.²⁶

Beacon Hill's "PLA Effect" is a projection of bid costs data. Bid figures do not provide a reliable basis for comparison. The Beacon Hill team looked at bid figures that were rejected, submitted by unsuccessful bidders. There is no way to know about the accuracy and basis of these bids or the skill, experience, or business acumen of the various bidders. A much more useful study examines actual costs, or isolates labor costs from other construction costs, and compares labor costs between a particular PLA, various area craft agreements and area standards. The authors state that they "contacted town and city officials, architects and contractors requesting data for each school construction project, including the... final actual base construction cost (if the project was completed)..."²⁷ but then do not present any such data. The fourteen page report is notable for what it does not include. There are, for example, no data broken down by the 117 schools it claims to have sampled, no detail about the nature and size of each project, no comparison of similarly-situated projects performed with and without a PLA.

The Beacon Hill Institute report also fails to consider a number of significant factors that impact construction costs. Beacon Hill focused on the size of the project in square feet but did not account for such important determinants of cost as these: whether the work involved new construction or renovation, site preparation, laboratories, classrooms, kitchens, lunchrooms, gymnasiums, auditoriums, or audio/visual facilities.

Another shortcoming of the Beacon Hill study relates to the very nature of PLA work: the study didn't account for the likelihood that many PLA projects will be more complex, involve more amenities, be larger and operate under time constraints that can impact costs and that these same considerations are at issue when PLAs are authorized in the first place.²⁸

What PLA opponents have consistently failed to demonstrate is that the PLA is itself responsible for a project's increased costs. A favorite target for many years was the PLA for the massive Central Artery/Third Harbor Tunnel ["Big Dig"] project in Massachusetts. Construction on this project, the largest public works project in US history, began in 1991 and was substantially completed in 2006. Early cost estimates for the project were \$2.3 billion in 1983 [approximately

²⁶ *Project Labor Agreements*, Belman, Bodah, Phillips, at 14.

²⁷ Beacon Hill at 8.

²⁸ See *Project Labor Agreements*, Belman, Bodah, Phillips, at 36-37.

\$6 billion in 2006 dollars], then revised to \$5.8 billion in 1991, and \$13.6 billion in 2000. Actual cost at completion was \$14.8 billion; construction costs represented \$9.6 billion of that total.²⁹

Throughout the Big Dig project, PLA opponents, including the Beacon Hill Institute, sought to pin the project's mounting costs and overruns on the project's PLA. This was not only simplistic. It is not true. The Massachusetts Transportation Authority conducted an extensive post-job analysis in 2007, a history of the project's costs.³⁰ At no point are labor costs or the PLA identified as responsible for the project's increased costs.

A US Department of Transportation fifty-page Task Force report in 2000, written in response to concerns about the project's escalating costs, also found no correlation between the PLA and the cost increases. This report made thirty-four recommendations affecting accounting, oversight and cost containment practices. It suggested that project officials incorporate labor costs into more accurate monthly projections of overall costs along with estimates for petroleum consumption, insurance premiums, consultant support services, and design activities.³¹

Cost increases on the Big Dig were instead attributable to design changes and engineering problems, controversial accounting and management practices, inflation, the increased scope of the project, and costs incurred to minimize the project's impact on the city's traffic and commerce. Unforeseen engineering problems resulted from soil conditions, the costs of tunneling through landfill, soft clay, and glacial till, the need to stiffen soil and relocate a labyrinth of old and often unmapped utility lines.

Fair labor standards under attack

The controversy over PLAs and labor costs is misplaced. The Big Dig was an especially large and complex project. Design, engineering, equipment, and materials costs factor into the final costs of nearly all projects. Labor costs ought not to be a factor in so far as prevailing wage provisions govern public works projects whether or not those projects are performed under PLAs. It is hardly surprising that among those voices most outspoken against PLAs are opponents of the prevailing wage. One such opponent is Beacon Hill's Executive Director David

²⁹ *Cost/Schedule Update of the Central Artery/Tunnel Project*, Massachusetts Turnpike Authority, May 2007, available at: <http://www.masspike.com/big/dig/updates/finances.html#0507>.

³⁰ *Ibid.* NB "Cost History" at 15.

³¹ *Federal Task Force on the Boston Central Artery/Tunnel Project, Review of Project Oversight and Costs*, US Department of Transportation, 3/31/2000 at 5.

Tuerck who argues for repeal of the Massachusetts prevailing wage law as a way to cut public works' construction costs.³²

Beacon Hill represents those in the industry who seek competitive advantages by driving down labor costs and other protective labor standards. Recent studies by Cornell's School of Industrial and Labor Relations, the Fiscal Policy Institute, and the Brennan Center,³³ among others, show just how damaging wage competition has become in the construction industry. Such practices as "under the table" cash payments, ignoring wage, hour and tax laws, and intentional misclassification of workers as independent contractors—to deny workers benefits and evade tax payments, workers compensation and unemployment insurance premiums—has become rampant.

The Fiscal Policy Institute estimated that the cost to taxpayers of such illegal underground activity in New York City's construction industry to be over half a billion dollars—with one-in-four construction workers either misclassified or paid off the books. Cornell ILR studied four years of Unemployment Insurance audits (2002-2005) and concluded that 15% of the state's construction workforce is misclassified.

The construction industry is particularly prone to worker abuse through misclassification. Studies conducted by the U.S. General Accounting Office and for the U.S. Department of Labor underscore that the construction industry stands out both as the industry with the highest percentage of independent contractors [22%] but also as the industry with the "highest incidence of misclassification."

This finding should come as no surprise. Construction is an expanding but fiercely competitive contract industry, characterized by slim profit margins, high injury and comp rates, comprised largely of numerous small to medium-sized companies whose numbers and size may make them more likely to operate beyond the view of state regulators. It is labor intensive, its jobs are temporary and many jobs, particularly in unlicensed trades, can be broken down into piece work. It is a lucrative employment source for immigrant, often undocumented, workers

³² David Tuerck, "Next Target: The Prevailing Wage Law," *The Boston Globe*, August 20, 2008. Available at boston.com.

³³ *The Cost of Worker Misclassification in New York State*, Linda H. Donahue, James Ryan Lamare, Fred B. Kotler, Cornell School of Industrial and Labor Relations, February 2007, NB 6-8. Available at <http://digitalcommons.ilr.cornell.edu/reports/9/>

Unregulated Work in the Global City: Employment and Labor Law Violations in New York City, Annette Bernhardt, Siobhan McGrath, and James DeFilippis, Brennan Center for Justice at New York University, April 2007. Available at: www.brennancenter.org.

Building Up New York, Tearing Down Job Quality: Taxpayer Impact of Worsening Employment Practices in New York City's Construction Industry, Fiscal Policy Institute, December 2007. Available at www.fiscalpolicy.org.

and unscrupulous employers use their workers' alleged independent contractor status to circumvent employer obligations under federal immigration laws. And the construction workforce is mobile — making it difficult for regulators to track down particular employers. All the elements are present throughout the industry but misclassification and “under the table” practices operate with particular impunity in the large and expanding residential and commercial sectors.

PLAs are a bulwark against the attack on labor standards. And they have been very successful at saving costs while maintaining collectively bargained and statutory standards.

Fair labor standards, responsible contracting and PLA bidding

In a climate where labor standards are threatened by fiercely competitive pressures, it makes sense to highlight two Executive Orders issued in 1993 by then Governor Mario Cuomo and continued by all three succeeding gubernatorial administrations: Executive Orders 170 and 170.1 establishing uniform guidelines for determining the responsibility of bidders.³⁴

These Orders, together with the Pataki Executive Order No. 49 [encouraging the use of PLAs] are key elements of state policy on competitive bidding and all relate to safeguarding the public interest in obtaining the best work for the money with fair labor standards compliance. The criteria articulated in these Orders apply to contracting for all public works projects — whether or not a PLA is authorized — and should guide agencies evaluating the qualification of PLA bidders.

While statutes and ordinances typically require that contracting agencies make awards to “the lowest responsible bidder,” the meaning of “responsible” may not be defined with enough specificity to guide agency decision makers. The Cuomo Orders establish twelve areas for testing bidder compliance. These are summarized as follows:

1. Lack of adequate experience, prior experience with comparable projects, for financial resources to perform the work...in a timely, competent, and acceptable manner
2. Criminal conduct in connection with government contracts or the conduct of business activities
3. Grave disregard for the personal safety of employees, State personnel, or members of the public. Agencies are to review company practices around training and monitoring

³⁴ 9 NYCRR Sec 4,170, 4,170.1 (2008)

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4. Willful noncompliance with the prevailing wage and supplements payments
 5. Any other significant labor law violations such as child labor violations, failure to pay wages or unemployment insurance tax delinquencies
 6. Any significant violation of the Workers' Compensation Law
 7. Any criminal conduct involving environmental practices
 8. Failure of a bidder to demonstrate good faith compliance with applicable federal or State statutes and regulations requiring utilization of women and minority owned and disadvantaged business enterprises
 9. Failure of a bidder to comply with federal and State statutes or regulations for the hiring, training, and employment of persons presumed to be disadvantaged per equal employment opportunity requirements
 10. Submitting a bid that is mathematically or materially unbalanced
 11. Submitting a bid so far below the agency's cost estimate that it appears unlikely the bidder can perform at that price
 12. Any other cause so serious as to cause the agency to question the bidder's responsibility such as submitting a false or misleading statement on a uniform questionnaire

Agencies typically have questionnaires that are based on the Cuomo Orders and that request relevant information from prospective bidders. These questionnaires can seek more detailed information about such issues as apprenticeship certification, financial history, wage and hour and other labor law compliance. Accompanying such questionnaires should be a statement articulating the agency's responsible contracting policy.

One procedure for determining lowest responsible bidder is as follows:

• **Step One:** Provide notice to potential bidders:

- A statement articulating the agency's responsible contracting policy should accompany bid solicitations

• **Step Two:** Questionnaire sent to the apparent low bidder:

- Upon receipt of all bids, the contracting agency identifies the apparent low bidder

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- The apparent low bidder is then sent a questionnaire
 - The apparent low bidder has a specified time, e.g., up to one week [seven calendar days], to provide responses to the questionnaire
 - **Step Three:** Preliminary determination of “Lowest Responsible Bidder”
 - The contracting agency analyzes questionnaire responses
 - Based on this analysis, the agency makes a preliminary determination of contractor status as “lowest responsible bidder” for the particular project within the meaning of the responsible contracting policy
 - **Step Four:** Certification or preliminary disqualification
 - The agency, based on its analysis of the information received, will either:
 - ✦ CERTIFY the apparent low bidder as the “Lowest Responsible Bidder,”
 - OR
 - ✦ PRELIMINARILY DISQUALIFY the apparent low bidder
 - › The agency formally notifies the apparent low bidder of its decision in writing
 - › An apparent low bidder is sent written notification stating the reasons that it is Preliminarily Disqualified
 - › The Preliminarily Disqualified bidder will, in the same Notice, receive the date, time, and location of a Hearing to be conducted within a specified time, e.g., one week [seven calendar days], prior to a final determination that the apparent low bidder is either certified as the lowest responsible bidder or disqualified
 - › Final determination that the apparent low bidder is disqualified, pursuant to this policy, for the particular project in no way limits that apparent low bidder from bidding on other projects let by the agency

Requiring that the bidder be party to a New York State certified apprenticeship program provides an important standard for quality work. The New York City School Construction Authority, for example, has since 1992, made this a condition for contract awards over \$25,000 on projects larger than \$1 million.

PLAs as Tools for Workforce and Community Economic Development

Provisions for apprenticeship training and hiring
of minority, women, and low income workers

Proponents of PLAs have frequently found common ground with advocates for workforce and community development local hiring and for low-income, minority and women workforce and economic. This adds another dimension to PLAs' value for the public interest.

Following are illustrations of innovative provisions from selected PLAs and PLA projects. The point is that PLA planning provides the opportunity for various parties—public owners, contractors, unions, and community groups—to formulate innovative pre-apprenticeship programs, apprenticeship, training, and hiring goals that serve broad, important policy goals as well as the needs of the industry.

- *Tappan Zee Bridge PLA*

“...up to 50% of the apprentices placed on the project shall be first year, minority, women, or economically disadvantaged apprentices as shall be 60% of the apprentice equivalents, placed on the project, who do not necessarily meet all of the age or entrance requirements for the apprentice program or have necessarily passed the entrance exam.”

- *New York City School Construction Authority PLA*

“Recognizing the need to maintain continuing supportive programs designed to develop adequate numbers of competent workers in the construction industry and to provide craft entry opportunities for minorities, women and economically disadvantaged non-minority males, Contractors will employ apprentices... in a ratio not to exceed 25% of the work force by craft...”

“In the event a Local Union either fails, or is unable, to refer qualified minority or female applicants in percentages equaling affirmative action goals as set forth in the Authority's bid specifications, the Contractor may employ qualified minority or female applicants from any other available source.”

This and similar contract provisions gain traction through specific industry-based labor management partnerships for workforce development. A leading example, for both New York City and the nation, is *Construction Skills 2000—the Edward J. Malloy Initiative for Construction Skills*. The program is jointly-sponsored by the Building and Construction Trades Council of Greater New York and the Building Trades Employers Association; BTEA President Lou Coletti serves as Chairman and Building Trades Council Chief of Staff Paul Fernandes is President and CEO. It is supported by the Port Authority of New York/New Jersey, the New York City

School Construction Authority, the New York City Department of Education, the New York Building Congress, and the Consortium for Worker Education. *Construction 2000* places New York City high school graduates, veterans, women, and economically disadvantaged workers into apprenticeship programs of unions affiliated with the Building and Construction Trades Council. It has a laudable track record having placed over 700 adults as of 2007. 87% of these placements went to individuals from the African-American, Hispanic, and Asian communities and a five-year long [2001-05] survey showed that the vast majority [81%] remain actively employed in the industry. Named a lead provider of services in 2005 by the NYC Mayor's Commission on Construction Opportunity, CS 2000 received national recognition the following year with the *Construction Users Roundtable Workforce Development Award*.³⁵

• *Central Artery / Tunnel ("Big Dig") PLA*

The massive Central Artery /Tunnel project in Massachusetts, had a strong record of meeting affirmative action goals pursuant to its PLA. As reported in a Cornell ILR paper as the project was underway.³⁶ As of 2000:

- Minority employment was approximately 15 percent overall or nearly five million worker hours since the project began. Employment of women was 3.7 percent overall or 1.208 million worker hours. Women-owned businesses billed the project for more than \$350 million. Contractors provided training through the Central Artery Training Program to minorities, women, and residents of the communities impacted by the project and access was provided to project related jobs. The program graduated 400 people into the trades, many of whom are currently serving apprentices. 34 percent were women, 65 percent minorities, and 64 percent were from the area impacted by the CA/T project.
- Union leadership played a key role in facilitating minority training and access in part through close contact with community based organizations. Boston Building Trades Secretary Treasurer Joe Nigro sat on the Board of Directors of the Massachusetts Alliance for Small Contractors, a non-profit organization providing business development courses, workshops, and seminars for minority and women contractors. And Massachusetts State Building Trades Council

³⁵ "Coletti to Head Skills Corp.," *Real Estate Weekly*, 2/14/2007; Construction Skills 2000 Career Day Attracts Employees of the Future", *Real Estate Weekly*, 8/13/2003, available at www.thefreelibrary.com; also see "With a Little Help, Gaining Broader Access to Better-Paying-Paying Jobs," Joseph P. Fried, *New York Times*, 6/19/2006 and www.constructionskills.org.

³⁶ *Digging Into the Big Dig: The Central Artery/Tunnel Project—Is It Working?* Fred B. Kotler, Cornell ILR, September 2000, at 7-8. Available from the author: fbk2@cornell.edu.

President Joe Dart served as a Board member of Move Massachusetts, a broad coalition of neighborhood, environmental, business, labor, and public sector organizations.

• *Los Angeles (California) Unified School District PLA*

"Unions shall recruit school district graduates and local community residents from the District's attendance area to be employed on Project work. Unions agree, to the extent law permits and as long as they possess the requisite skills and qualifications, district graduates and local community residents from the District's attendance area shall be first referred, including apprenticeship and other subjourney person positions until at least 50% of the positions for a particular Contractor (including core employees) have been filled with graduates and attendance area residents..."³⁷

• *Port of Oakland Maritime and Aviation Project Labor Agreement (MAPLA), Oakland, CA*

\$1.2 billion Port of Oakland modernization project PLA (MAPLA) requires local hiring through the oversight of a joint Port-Union Social Justice Committee.³⁸

• *East Side Union High School District PLA, San Jose, CA*

The 2004 PLA establishing a *Construction Technology Academy* provided vocational education for construction industry jobs as part of a \$300 million school construction and renovation project: pre-apprentice training, summer internships, and jobs in both blue collar and white collar occupations within the construction industry. Academy graduates—many of whom are from minority communities—had priority in union apprenticeship programs.³⁹

³⁷ PLA text quoted in *Getting to the Table: A Project Labor Agreement Primer*, National Economic Development and Law Center, Liam Garland and Susie Snafai, Oakland, California, 2002 at 19.

³⁸ *Port of Oakland Maritime and Aviation Project Labor Agreement—Entered Into Between Davillier-Sloan, Inc./Parsons Constructors, Inc. and the Building and Construction Trades Council of Alameda County (California) AFL-CIO*, 2000, Article III at 10. Available at www.communitybenefits.org.

³⁹ *Project Labor Agreements*, Belman, Bodah, Phillips, reported in detail at 53-59.

Conclusion

- A project labor agreement (PLA) is a pre-hire, uniform agreement for a particular project that standardizes schedules, work rules and other terms and conditions among various crafts for the length of the project, and provides for dispute resolution procedures as alternatives to strikes and lockouts.
- PLAs have long been used in the private sector to promote stability, efficiency, and productivity on construction job sites. Since the US Supreme Court Boston Harbor decision in 1993, such agreements have been available to state, county, and municipal construction users.
- Public-sector Project Labor Agreements [PLAs] in New York State must be shown to have a proper business purpose, consistent with state competitive bidding statutes, by providing direct and indirect economic benefits.
- PLAs are a valuable construction management tool for project planning and labor cost reduction.
- A key point made here is that there is no evidence to support claims that project labor agreements either limit the pool of bidders or drive up actual construction costs. Such claims by PLA opponents are based on inadequate data and faulty methodology. PLAs—in New York City and State and elsewhere—have instead proven very successful at saving costs while respecting fair labor standards.
- PLAs' cost savings are both direct and indirect and can be substantial. These labor cost savings are typically achieved by the following:
 - Direct cost savings provisions
 - ◆ Alternative dispute resolution procedures for—and containment of—workers' compensation costs
 - ◆ Elimination or reduction of premium rates including increased contractor flexibility for scheduling
 - ◆ Reduction and standardization of the number of paid holidays
 - ◆ Increased utilization of apprentices

- Indirect cost savings provisions
 - ✦ Uninterrupted production, removal of potential friction, and heightened cooperation between labor and management made possible by
 - › A uniform contract expiration date for all crafts
 - › No strike provisions
 - › Expedited dispute resolution procedures and joint committee structures to address a broad range of jobsite issues including jurisdiction
 - › Contractors having immediate access to a pool of skilled labor during the hiring phase and throughout the life of the project
- Public-sector PLAs are not “union-only” agreements. PLA signatories are not necessarily bound to other jurisdiction-based agreements. State competitive bidding statutes, such as those in New York State, require bidding that is open to both union and nonunion contractors.
- Contract awards must be non-discriminatory as to union status and can be properly conditioned on the willingness of a successful bidder to sign the PLA.
- PLAs are effective instruments for workforce and community economic development and to meet public policy objectives for equal employment opportunities. PLA provisions expand opportunities for apprenticeship training as well as for the hiring of minority, women, and low income workers.

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